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CHARLES ELMORE CROPLEY

No. 724

In the Supreme Court of the United States

OCTOBER TERM, 1939

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

CHICAGO HEIGHTS TRUCKING CO. ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATE FOR THE NORTHERN DISTRICT OF ILLINOIS

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OPINIONS BELOW

The specially constituted district court rendered no opinion. Its findings of fact and conclusions of law appear at R. 490. There were two reports of the Commission. That of Division 5 (R. 29) is reported in 10 M. C. C. 556; that of the full Commission (R. 13) is reported in 17 M. C. C. 573.

JURISDICTION

The final decree of the district court (R. 494) was entered November 7, 1939. The petition for appeal was filed and allowed January 5, 1940. Prob-

able jurisdiction was noted by this Court, March 4, 1940. The jurisdiction of this Court rests on Section 5 of the Commerce Court Act, c. 309, 36 Stat. 539, 28 U. S. C., Supp. III, Section 45a; Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938, par. (4), 28 U. S. C., Section 345, and the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 210, 219, 28 U. S. C., Supp. III, Sections 45, 47a.

QUESTIONS PRESENTED

1. Whether Section 216 (d) of Part II of the Interstate Commerce Act incorporates the "rule of equality" contained in Section 2 of Part I of the Act.

2. Whether the Interstate Commerce Commission acted within the scope of its authority in condemning certain tariffs sought to be filed by carriers by motor vehicle as unlawful and ordering their cancellation.

STATUTE INVOLVED

The statute involved is Part II of the Interstate Commerce Act, otherwise known as the Motor Carrier Act, 1935, 49 Stat. 543, 49 U. S. C., Supp. I, §§ 301–327. Pertinent provisions of the statute are set forth in the appendix, *infra*, p. 31.

STATEMENT

The Proceedings Below

Appellees comprise 41 common carriers by motor vehicle subject to the jurisdiction of the Inter-

state Commerce Commission under Part II of the Interstate Commerce Act.

In 1937, appellees filed tariffs applicable to certain traffic by motortruck which were rejected by the Bureau of Motor Carriers in a letter dated September 11, 1937 (Ex. 17, R. 341). Appellees thereupon made a number of changes in the tariffs and refiled them to become effective on December 1, 1937, and January ~~18~~ 1938 (R. 47). The Commission, on its own motion, suspended the tariffs and ordered an investigation (R. 47). A hearing was held before an examiner who, on August 5, 1938, recommended that certain of the items of the proposed tariffs be ordered cancelled, but that as to the remainder of the schedules an order discontinuing the proceedings be entered (R. 56). Thereupon, argument was had before Division 5 of the Commission, which on December 14, 1938, found the proposed tariffs unlawful and directed their cancellation (R. 29ff.). One Commissioner dissented. Upon petition of appellees for reopening, the full Commission (11 members) heard oral argument, both on behalf of appellees and on behalf of various interveners appearing in opposition to the proposed tariffs. On July 29, 1939, the Commission issued a report (with two Commissioners dissenting and one not participating), finding the tariffs unlawful and directing their cancellation (R. 13 ff.).

On September ~~14~~ 6, 1939, appellees filed this suit

seeking an annulment of the Commission's order on the grounds that the findings of the Commission were inadequate to support its order; that, contrary to the Commission's determination, the tariffs were in accordance with law, not unreasonable, discriminatory, or otherwise unlawful, and that the order of the Commission was unsupported by evidence. On November 7, 1939, the specially constituted district court, without rendering any opinion, entered findings of fact and conclusions of law substantially as presented by appellees (R. 490) and entered a final decree permanently enjoining the Commission from cancelling the proposed tariffs (R. 494).

The Proposed Tariffs

The tariffs in controversy (R. 204 ff.) were denominated as "proportional" rates by appellees and fall roughly into two categories:

(1) The first category includes rates for l. t. l. (less than truckload) shipments, all freight between outlying marketing areas and named concentration points (Chicago, Indianapolis, South Bend, Muncie, Fort Wayne, and Evansville) immediately preceding or following the transportation of the shipment in a truckload or carload consignment.[1] These rates are the most important

[1] These rates are described as follows in the tariffs: "(a) 'All freight' [except for certain named commodities] which has been transported to the origin station named herein, as a part of a truckload consignment or carload consignment moving under tariffs or schedules lawfully on file

ones in controversy here. Their significant characteristics are these: (a) They are lower, generally speaking, than the applicable local rates for the same movement of the same commodity. To illustrate—a shipper in Racine, Wisconsin, who makes an l. t. l. first class shipment by truck to a consignee in Chicago, pays 48 cents per hundred pounds (R. 329, Ex. 14). Under the proposed tariffs if the same shipment is made to a consignee beyond Chicago and is so shipped that it becomes part of a consolidated carload or truckload at Chicago, the rate will be 30 cents for the distance from Racine to Chicago (R. 212, Ex. 1). (b) The sole justification for the discrimination exhibited by these rates is that immediately following the carriage under the proposed rate the shipment will be consolidated into a carload or truckload for further movement or that immediately preceding the carriage under the proposed rate the shipment had formed part of a carload or truckload. (c) As will be shown in more detail later, these rates while ostensibly open to the public can only be taken advantage of by certain organizations known as for-

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with the Interstate Commerce Commission and immediately reshipped in the original package as an l. t. l. shipment; or

"(b) 'All freight' [except for certain named commodities] which is to be transported to the destination station named herein as an l. t. l. shipment, and immediately reshipped in the original package as part of a truckload consignment or carload consignment moving under tariffs or schedules lawfully on file with the Interstate Commerce Commission" (R. 209, Item 5).

warding companies and by large shippers. (d) These rates are "all freight" rates as contradistinguished from "class" or "commodity" rates—i. e., all freight (with certain named exceptions) which comes within the described movement will move at the same rate irrespective of the value or character of the commodity.

(2) The second category is of minor significance. It includes certain quantity and truckload rates. The truckload rate proposed is one of $25 per truck between Chicago and Milwaukee for all freight where the movement between these two points immediately precedes or follows the transportation of the shipment in a truckload or carload consignment (R. 212, Ex. 1, Item 35). The proposed quantity rates provide a flat rate of 25 cents per hundred pounds for 10,000-pound shipments and 20 cents per hundred pounds for 20,000-pound shipments complying with certain conditions (R. 212, Ex. 1, Note 2). Appellees appear to have made no attempt to justify these rates; they were found to be unlawful by the trial examiner; and they were apparently not pressed before the district court. Nevertheless, that court did not differentiate these rates from the l. t. l. rates and its decree covers the entire schedule.

It is conceded by appellees that the principal traffic which will be transported under the proposed tariffs is what is known as "forwarder" traffic (R. 5). The problem of the forwarder is

the occasion for the introduction of these tariffs and is of such decisive importance in the case that some consideration is necessary in order to understand the issues involved.

The Problem of the Forwarder

Forwarders (or forwarding companies) are middlemen of the transportation business. The forwarding company solicits less-than-carload shipments, secures their transportation to a concentration point where they are concentrated into carloads, and then secures the transportation to destination by the most convenient means. The forwarder pays the carload rate and receives payment from the shippers at or approximately the less-than-carload rate. It thus operates within the spread between what may be called the wholesale (carload) rate and the retail (l. c. l.) rate. *Freight Forwarding Investigation*, 229 I. C. C. 201, 209. There are some 20 forwarders in the country, three of which are of major proportions receiving a total of about $102,000,000 in revenue in 1936. *Ibid.*, at 203. Several of the larger forwarding companies are connected by various financial ties to railroads. *Ibid.*, at 204–207.

The Interstate Commerce Commission has recently conducted two important proceedings with reference to forwarding companies. In *Acme Fast Freight, Inc.*, 8 M. C. C. 211, the Commission held that the forwarders are not common or contract carriers by motor vehicle within the meaning

of Part II of the Act, that they are not entitled to certificates of convenience and necessity, that they cannot participate in joint rates with common carriers by motor vehicle, and that they cannot utilize contract carriers by motor vehicle to transport the shipments for which they assume responsibility. The order of the Commission has been sustained by the District Court for the Southern District of New York. *Acme Fast Freight, Inc.*, v. *United States*, 30 F. Supp. 968; appeal docketed March 26, 1940, No. 840.

In the *Freight Forwarding Investigation*, 229 I. C. C. 201, the Commission found that the freight-forwarding system was subject to many abuses through discriminations in favor of the forwarders by the railroads, and ordered these abuses corrected. It found further that while the forwarder has characteristics of a common-carrier transportation agency, it is not a common carrier either by rail or motor vehicle as that term is used in the Act and that the forwarders are not subject to the provisions of the Act. It also found that the forwarder is not an express company. Lastly it recommended that the rail lines attempt by appropriate cooperative effort to undertake the forwarder business themselves, and if they should fail to do so, that legislation be enacted to bring the forwarder under regulation. *Ibid.*, at 304.[2]

[2] Such legislation is now pending. See S. 2009, 76th Cong., 1st Sess.

Prior to the Commission's decision in the *Acme* case the forwarding companies had filed tariffs containing joint rates between the forwarders and motor carriers, out of which the carriers receive a division which differs from their regularly published rate charged other shippers. 8 M. C. C. at 225. The *Acme* decision ordered these arrangements cancelled and it was to meet this situation that the carriers here undertook to file the so-called proportional rates here in controversy (R. 5). Appellees concede that the rates in the suspended schedules herein are identical with the "divisions" received by the carriers under the joint rates found by the Commission to be unlawful (R. 6).

The Commission's Findings

The Commission's ultimate finding was that "the proposed less-than-truckload rates would be unlawful in that they would violate Sections 216 (d), 217 (a), and 217 (c) of Part II of the Act" (R. 20). Its principal subordinate findings were that "these rates are published as proportional rates primarily as a matter of expediency to serve the purpose of certain freight forwarders and to perpetuate in another form so-called divisions of purported joint rates of the freight forwarders" (R. 15); that the rates do not come within the definition of proportional rates (R. 15) and that the tariffs naming them "are not what they purport to be, are lacking in clarity and definiteness," and therefore are in violation of Sections 217 (a) and

217 (c) of Part II of the Act (R. 17); that insofar as the proposed rates are published to apply in connection with consignments transported under schedules of contract carriers, they are inconsistent with appellees' status as common carriers since common carriers and contract carriers may not join with each other in arrangements for through transportation (R. 18); that the proposed rates constitute a device whereby the forwarders and possibly a very few large shippers who can avail themselves of those rates will be afforded transportation at rates lower than the rates which will be charged certain other shippers under substantially similar circumstances and conditions, in violation of Section 216 (d) (R. 19); that the tariffs contain no adequate policing rules (R. 19); that there is no evidence in the record that the owners of property transported under the proposed rates would obtain any saving in transportation charges (R. 20).

SUMMARY OF ARGUMENT

Section 216 (d) of Part II of the Interstate Commerce Act incorporates the "rule of equality" contained in Section 2 of Part I. Congress enacted the "rule of equality" for motor carrier regulation by including the words "unjust discrimination" in 216 (d). The "rule of equality" was the great purpose of the Interstate Commerce Act. *New Haven R. R.* v. *I. C. C.*, 200 U. S. 361, 391; *Louisville & Nashville R. Co.* v. *United States*, 282 U. S. 740, 749. Congress did not omit from a compre-

hensive regulation of motor carriers the very cornerstone of the act to regulate rail carriers. It was unnecessary for Congress to reenact the whole of Section 2 because the words "unjust discrimination" constitute a term of art. The legislative history supports this conclusion.

The Commission properly found that the proposed rates violate Section 216 (d). The proposed less-than-truckload rates are lower than the appellees local rates and are thus obviously discriminatory. The Commission did not find persuasive the contention of appellees that the discrimination was justified by substantial dissimilarity of circumstances and conditions. The Commission properly drew inferences unfavorable to the rates on the basis of the evidence in the record.

The Commission's duty in passing upon proposed rates is an administrative one which must be discharged within broad limits of discretion and judgment. *Swayne & Hoyt* v. *United States,* 300 U. S. 297, 304. The Commission's duty transcends the narrow interests of the shippers and carriers involved in the particular case and involves a consideration of the adequacy of the transportation system as a whole. The Commission has historically construed the "rule of equality" with the greatest strictness. It was particularly justified in refusing to permit a relaxation of that rule in this case because of the problems raised by the situation of the forwarders. In this case the Commission was presented with a series of rates intended to

perpetuate advantages which the forwarders had previously enjoyed, some of these advantages being of doubtful legality. The proposed rates are novel in form; their implications to shippers, motor carriers, and rail carriers are unknown; they may create vested interests which will complicate further attempts to deal with the forwarder problem. All these are factors which the Commission is competent to take into consideration in refusing to relax a rule whose strict maintenance has been one of the fundamental principles of its half century of life. The necessary "rational basis" for the Commission's action is clearly established. *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125.

The finding of the Commission that the tariffs do not contain adequate policing rules was properly considered by the Commission as one among the various defects which made for the invalidity of the tariffs as a whole.

There is no warrant for setting aside the Commission's finding that the proposed tariffs violate Sections 217 (a) and 217 (c) because they are "lacking in clarity and definiteness." If appellees believe that they can escape the strictures of statute and regulations by adopting a different name for the rates, their obvious remedy is to refile the rates.

In any event, the decree of the court below is too broad in that its injunction extends to the Com-

mission's order finding invalid the proposed quantity and truckload rates. These rates were not justified by appellees and they were found to be unlawful on three different occasions. Even if the finding of the lower court on the lawfulness of the l. t. l. rates should be affirmed by this Court, the decree should be modified to permit the Commission's order to stand with respect to the quantity and truckload rates.

ARGUMENT

I

SECTION 216 (D) OF PART II OF THE ACT INCORPORATES THE "RULE OF EQUALITY" CONTAINED IN SECTION 2 OF PART I

The Commission found that the proposed rates would violate Section 216 (d) of Part II in that they "constitute a device whereby the forwarders * * *, and possibly a few large shippers who can avail themselves of these rates, will be afforded transportation at rates lower than the rates which will be charged certain other shippers under substantially similar circumstances and conditions" (R. 19).[3] It construed the prohibition against "un-

[3] It has long been settled that in a Section 2 case the Commission need not find the existence of competition between traffic moving under the alleged unlawful rate and other traffic nor injury to any particular person or traffic. *I. C. C.* v. *Alabama Midland R. Co.*, 168 U. S. 144. The Commission has held in a number of cases that in a Section 3 case it must be shown that the complainant suffers injury

just discrimination" in that Section as being in this respect similar in purpose to Section 2 of Part I "that is, to insure equality of rates as to all and to prevent favoritism." There is thus presented at the outset of this case a question of statutory construction.

Section 216 (d) reads in part as follows:

> It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, or description of traffic in any respect whatsoever, or to subject any particular person, port, gateway, locality, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . .

The language here is identical word for word with Section 3 (1) of Part I, with the exception of the words "unjust discrimination" which occur

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by reason of the discrimination. See e. g. *Duluth Chamber of Commerce* v. *Ry. Co.*, 122 I. C. C. 739. It cannot be said however that the necessity of showing injury exists in cases where the Commission acts on its own motion on behalf of the public. Thus in *Louisville & Nashville R. Co.* v. *United States*, 282 U. S. 740, an order of the Commission under both Sections 2 and 3 was upheld despite absence of a showing of injury.

[4] Division 5 had previously reached a similar construction of Section 216 (d). *Arrangements-Arrow Carrier Corp. and Duplan Silk Corp.*, 4 M. C. C. 657, 677.

towards the end of Section 216 (d). The words "unjust discrimination" appear, however, in Section 2 of Part I which reads as follows:

> That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Section 2 sets forth the "rule of equality" of which this Court has said: "*It cannot be challenged that the great purpose of the act to regulate commerce,* whilst seeking to prevent unjust and unreasonable rates, *was to secure equality of rates as to all and to destroy favoritism,* these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination." *New Haven R. R.* v. *I. C. C.*, 200 U. S. 361, 391 [italics supplied]. "The legislative history of the Interstate

Commerce Act shows clearly that the evil of discrimination was the principal thing aimed at." *Louisville & Nashville R. Co.* v. *United States*, 282 U. S. 740, 749.

The evil of discrimination between shippers was rife before the enactment of the Interstate Commerce Act. "Probably no other aspect of railroad transportation was as influential in compelling regulation by the Federal Government as this most elementary of abuses." Sharfman, *The Interstate Commerce Commission*, III–B, p. 361. The prohibition against undue prejudice or disadvantage contained in Section 3 is of relatively minor consequence compared to the rule of equality of Section 2. "Unless like traffic movements pay like charges, there is slight excuse for great concern over the differential treatment of dissimilar commodities and hauls and the undue preferences and prejudices to which it may lead." *Ibid.*, at p. 360.

It would have been strange indeed if Congress had omitted from a comprehensive regulation of motor carriers the very cornerstone of the act to regulate rail carriers.[5] Congress made no such omission. It affirmatively enacted the rule of equality by including the words "unjust discrimination" in Section 216 (d).

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[5] The "rule of equality" is of considerable antiquity. Section 2 was patterned after the so-called Equality Clause (Sec. 90) of the English Railway Clauses Consolidation Act of 1845. *Interstate Commerce Commission* v. *Delaware, L. & W. R. R.*, 220 U. S. 235, 253.

It was argued in the court below that if Congress wanted to include Section 2 in the Motor Carrier Act, it would have reenacted its provisions in full. This argument overlooks the fact that a repetition *ipsissimis verbis* of Section 2 was wholly unnecessary. It will be noted that this Section begins by setting forth various practices which might be indulged in by a common carrier and concludes by saying that "such common carrier shall be deemed guilty of unjust discrimination which is hereby prohibited and declared to be unlawful." The words "unjust discrimination" are thus completely described in that section and constitute a term of art well understood by those versed in the problem of rate regulation.

Appellees in effect contend that the words "unjust discrimination" are pure surplusage. Conceivably Congress may use words which have no meaning, though every presumption is against such a conclusion. *Market Co. v. Hoffman*, 101 U. S. 112, 115; *Ex parte The Public National Bank of New York*, 278 U. S. 101, 104. But it cannot be claimed that such is the result where Congress has deliberately inserted a phrase so significant to rate regulation and with so long and important a history.

There is nothing in the legislative history which casts any doubt on this conclusion. On the contrary, the Federal Coordinator of Transportation, in his report recommending the enactment of a bill to regulate motor carriers, stated: "Section

315 [substantially identical with Section 216 of the present Act[7]] provides substantially the same regulation of rates, fares, and charges of common carriers by motor vehicle as is applicable to rail carriers."[8] Congress, having this statement of the Coordinator before it, could not possibly have intended to omit one of the most important rules of rate regulation.[9]

II

The Commission Had Authority to Determine That the Proposed Rates Were in Violation of the Act

A. THE COMMISSION PROPERLY FOUND THAT THE PROPOSED RATES VIOLATE SECTION 216 (D)

The major controversy centers about the less-than-truckload rates[9] which the Commission found

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[7] Section 315 (b) of the Coordinator's draft bill is identical with the present Section 216 (d).

[8] Regulation of Transportation Agencies, Letter from the Chairman of the Interstate Commerce Commission Transmitting a Report of the Federal Coordinator of Transportation, Sen. Doc. No. 152, 73d Cong., 2d Sess. (1934).

[9] The Federal Coordinator was Commissioner Eastman, who dissented in the instant case. He did not disagree with the majority of the Commission that the rule of equality is contained in Section 216 (d), but he did not expressly agree with this construction (R. 23). It is significant, however, that Commissioner Eastman did join in the ruling of Division 5 in a previous case which construed the statute in the same way. *Arrangements, Arrow Carrier Corp. and Duplan Silk Corp.*, 4 M. C. C. 657, 677.

[9] These are the rates in the first category described on p. 4, *supra*.

to violate Section 216 (d) in that they were unjustly discriminatory.

It will be remembered that the proposed l. t. l. rates apply on all freight which is immediately preceded or followed by movement in a truckload or carload consignment. These rates are lower than the existing rates for local movement of the same commodities between the same points,[10] they were concededly filed in order to protect the interests of the forwarders, and, although ostensibly open to the public, they can be taken advantage of only by the forwarders and a few large shippers.[11] The proposed rates thus suffer from the vice found to exist in the practice of granting terminal and in-transit warehousing by railroads to shippers. This Court said of the terminal warehouse rates: "Since the

[10] The Commission found that the proposed rates are "materially lower" than appellees' local rates on like traffic between the same points (R. 18).

[11] A small shipper desiring to send a case of goods by truck from Racine to Chicago and thence by rail to Cleveland could not take advantage of these rates since his shipment would be l. c. l. throughout the entire movement. If he placed the shipment in the hands of a forwarder, then the latter could secure the proposed rate from Racine to Chicago, because, at the latter point he could consolidate this shipment with others to form a carload. A large shipper with scattered plants around Chicago could conceivably also secure the advantage of the rate. The various l. c. l. shipments from the different plants could be consolidated by him into a single carload if all were bound to the same destination. Similarly the large shipper might bring into Chicago a single carload from one of his suppliers and then distribute l. c. l. loads to his various plants under the preferential rate.

carrier warehouse rates, as found by the Court and Commission, are not open to all shippers alike, there is violation of §§ 2 and 3 (1) prohibiting discrimination and unreasonable prejudice." *B. & O. R. R.* v. *United States*, 305 U. S. 507, 524. And of the in-transit tariffs: "Some shippers are not in a position to avail themselves of the below-cost in-transit service. They must pay the full transportation rate, without any offset from the warehousing. This discrimination between shippers is unlawful * * *." *Ibid.*, at 526.

Appellees attempted to justify the obviously discriminatory character of the proposed rates by the contention that the circumstances and conditions surrounding the traffic which would move under the proposed rates are substantially dissimilar from traffic moving under established local rates. The substantial dissimilarity is said to arise from the fact that the l. t. l. shipments are preceded or followed by movement in a consolidated carload. More particularly appellees introduced evidence which they contend showed that the cost of the service to the carrier was less on forwarder traffic because of the necessity of making fewer stops and because the solicitation is done at the expense of the forwarder; that the traffic is different from local traffic in that it is essentially a movement of through l. c. l. shipments; and that the movements are affected by the commercial and competitive conditions applicable for long-haul shipments whereas traffic moved under local rates is affected

only by the local commercial condition and economic conditions.

The Commission did not find these contentions, and the evidence adduced to support them, persuasive. It found that the conditions and circumstances were not so dissimilar as to permit an exception to the rule of equality. Appellees contend that this finding is not based on substantial evidence because all the evidence which was introduced was in favor of the proposed rates. But, the problem here is not one of conflicting evidence but of the inference to be drawn from undisputed evidence. *United States* v. *Louisville & Nashville R. Co.*, 235 U. S. 314, 320–321. The Commission had before it the proposed rates and the existing local rates and the conditions and circumstances surrounding the movement of the various kinds of traffic. From this evidence the Commission drew inferences opposed to the lawfulness of the rates. Appellees contend that, in effect, the Commission placed on them the burden of proof of justifying the rates and that the Commission's determination is, for that reason, unauthorized. But this contention is a fundamental misconception of the Commission's function in a proceeding of this kind.

Through the enactment of the Motor Carrier Act, Congress attempted to "develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States" (Sec. 202 (a)). It directed that "it shall be the

duty of the Commission to regulate common carriers by motor vehicle as provided" in the Act (Sec. 204 (a) (1)). The Commission's duty transcends the narrow interests of the shippers and carriers involved in the particular case. Its duty is an administrative one which must be discharged within broad limits of discretion and judgment. "Whether a discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judgment of the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic." *Swayne & Hoyt* v. *United States*, 300 U. S. 297, 304. The adequacy of the transportation system as a whole must be constantly before it, particularly in dealing with questions of unjust discrimination. In dealing with the question in this case the Commission had to place it in its historic background, which includes on the one hand the history of the "rule of equality" and on the other the forwarder problem.

From its very inception the Commission has construed the rule of equality with the greatest strictness: "No view has been open to less qualification in the thought of the Commission than the principle declared by Congress that identical movements of traffic of substantially similar character should be charged precisely equal rates." Sharfman, *The Interstate Commerce Commission*, III–B, p. 755. At no time in its history has the Commission been readily disposed to grant relaxation of the rule.

and most of the relaxations which now exist have become established only after repeated and prolonged inquiry. This has been true in the case of passenger traffic (see Sharfman, *The Interstate Commerce Commission*, III–B, pp. 371–378) as well as in the case of carriage of goods. *Ibid*, pp. 378–413. In dealing with the problems which arise when relaxations of the rule of equality have been urged upon it, the Commission has not been confined within mathematically determined formulae but has been permitted to exercise that "flexible limit of judgment which belongs to the power to fix rates." Chief Justice White in *Atlantic Coast Line* v. *N. C. Corp. Comm.*, 206 U. S. 1, 26.

Nowhere, perhaps, has the necessity for the exercise of broad administrative discretion in dealing with relaxations from the rule of equality been better illustrated than in this case. The whole forwarder problem is now in flux. The forwarders have been held not to be common carriers, *Acme Fast Freight, Inc.*, 8 M. C. C. 211; many of the practices surrounding them have been condemned, *Freight Forwarding Investigation*, 229 I. C. C. 201; legislation intended to regulate them is now pending in Congress. In this case the Commission was presented with a series of rates intended to perpetuate advantages which the forwarders had previously enjoyed. Some of these advantages, the proposed quantity and truckload rates (*supra*, p. 6) were clearly illegal. Other advantages, the proposed l. t. l. rates, were designed to replace

previous divisions of joint rates which were, to say the least, of doubtful legality. *Acme Fast Freight, Inc., supra.* The record contained evidence indicating that if these rates were sustained, similar rates would be filed all over the country (R. 369). The proposed rates are novel in form; their implications to shippers, motor carriers, and rail carriers are unknown; they may create vested interests which will complicate further attempts to deal with the forwarder problem. All these are factors which the Commission as "a body of experts appointed by law and informed by experience" is competent to take into consideration in refusing to relax a rule whose strict maintenance has been one of the fundamental principles of its half century of life.

Appellees place great reliance upon *Texas & Pac. R. Co.* v. *I. C. C.*, 162 U. S. 197, in which this Court set aside an order directing the railroads to desist from charging less on import traffic from ports to inland destinations than on domestic traffic from and to the same points. That decision was rendered by a Court which frankly looked upon the Interstate Commerce Act as "experimental" legislation, 162 U. S. at 218, and the opinion is accompanied by a powerful dissent by Mr. Justice Harlan, (Chief Justice Fuller and Mr. Justice Brown joining in the dissent). The Act was new, and the rates which the Commission sought to strike down had been established long before its passage. The powers of the Commission were then

far less than they subsequently became, and the Court then took a most restricted view of the function of the Commission in passing upon the facts presented to it.[12] If this decision were to be applied as appellees contend, the door would be opened to the return of the manifold discriminations which the Commission has successfully outlawed by stern adherence to the rule of equality.[13]

This Court has pointed out that "the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body," *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286, and that "so long as there is warrant in the record for the judg-

[12] Sharfman, *The Interstate Commerce Commission*, III-B, p. 382, points out that this decision has not been construed to prevent adherence "to a strict construction of the Act in domestic situations," the matter of import rates being relegated to a distinct category.

[13] Appellees also rely on a number of cases in which the Commission has approved rates which appellees believe to be analogous to the proposed rates, including ex-lake rates on coal and ore (*Maritime Assn. of Boston* v. *Ann Arbor Railroad Co.*, 95 I. C. C. 539; *Trunk-Line & Ex-Lake Iron Ore Rates*, 69 I. C. C. 589; *Lake Cargo Coal Rates*, 101 I. C. C. 513, 126 I. C. C. 309), rates on coal transshipped by barge (*Ex-Ohio-River Coal*, 185 I. C. C. 211; *American Rolling Mill Co.* v. *B. & O. Co.*, 173 I. C. C. 357), and certain rates on cotton (*Cotton in the Southwest*, 208 I. C. C. 677, 216 I. C. C. 17). The Commission was not persuaded by these purported analogies (R. 16) and they cannot be pressed upon this Court which has no concern with the fact that a determination by the Commission may be inconsistent with its own prior determinations. *Western Chem. Co.* v. *United States*, 271 U. S. 268, 271; *Virginian Ry.* v. *United States*, 272 U. S. 658, 663.

ment of the expert body it must stand." *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125. These principles apply with particular emphasis here where the Commission was called upon to relax a rule to which it has adhered with the utmost strictness and under circumstances which involved uncertain consequences to the transportation system of the entire country.

The necessary "rational basis" for the Commission's conclusions is apparent not only in these larger matters of concern to the transportation system as a whole but also in the subsidiary considerations involving defects in these tariffs considered in their narrower aspect. The Commission found that the rates, except insofar as they may be used by a very few large shippers, are not the rates which would be charged the owners of the property shipped, and that there is no evidence that the owners of property transported would obtain any saving in transportation charges; that insofar as the rates purport to be proportions of through rates for application in connection with contract rates they are inconsistent with appellees' status as common carriers; that the tariffs do not contain adequate policing rules. It may be that no one of these subsidiary findings would of itself be sufficient to support a determination of unlawfulness. Taking them all together and placing them in conjunction with the doubtful implications of the proposal to the transportation system as a whole, and the re-

quirement of a "rational basis" for the administrative action is more than satisfied.

B. THE COMMISSION PROPERLY FOUND THAT THE PROPOSED RATES VIOLATE THE ACT IN OTHER RESPECTS

The Commission found that the tariffs filed by appellees did not contain adequate rules for policing (R. 19). One of the dissenting Commissioners had previously expressed a similar view (R. 43). The tariffs allow 48 hours at the reforwarding points within which shipments to be reforwarded must be tendered to the carriers performing the outbound movement from such reforwarding points. The only policing regulations provided are instructions requiring the billing of the shipment to show reference to the bill of lading of the preceding carrier on outbound movements from the reforwarding points, and reference to the ultimate destination of the property on inbound shipments to the reforwarding points (R. 14).

The Commission has the duty of seeing to it that adequate policing rules are contained in the tariffs filed with it, in order to prevent the use of the rates by traffic which does not comply with the requirements of the tariff. There is no basis for any contention that the Commission exceeded its authority herein. While there is merit to the dissenting Commissioners' suggestion that the inadequacy of the policing rules could be corrected by permitting the carriers to amend the tariff, the Commission was justified in considering this defect as one

of the numerous factors which made for the invalidity of the tariffs as a whole.

The Commission also found that the proposed tariffs are "lacking in clarity and definiteness" and hence violate Sections 217 (a) and 217 (c) (R. 17). The former Section requires the filing of tariffs in such form and manner as the Commission shall prescribe and authorizes it to reject any tariffs not in consonance therewith. The regulations prescribed by the Commission (Tariff Circular MF No. 2) require that all rates must be "explicitly stated" (R. 430). Section 217 (c) requires that a notice of a change of rates must "plainly state the change proposed."

The tariffs denominate the proposed rates as "proportional rates." The Commission found that these rates were not in fact proportional rates since they were not "proportions of, parts of, or remainders of through less-than-truckload rates or of less-than-carload rates subject to the interstate commerce act at which less-than-truckload shipment could be consigned under a through bill of lading from point of origin to final destination" (R. 15). Hence the Commission found that the rates "were not what they purport to be" and "lacking in clarity and definiteness." Appellees contend that the question is purely one of nomenclature and that they might just as easily have called them by some other name. The fact remains,

however, that the Commission has found the proposed nomenclature misleading and there is no warrant for setting aside its finding on so peculiarly technical a matter, *Norfolk Southern Railroad Co.* v. *Chatman*, 244 U. S. 276, 284. If the appellees believe that they can escape the strictures of statute and regulations by a different name, their obvious remedy is to refile the rates.

III

In Any Event, the Decree of the Court Below Is Too Broad

It will be remembered that in addition to the proposed l. t. l. rates about which the major controversy revolves, the suspended tariffs also contain proposed quantity rates and truckload rates (see *supra*, p. 6). The trial examiner found with respect to the proposed quantity rates that the manner of statement in the tariff was ambiguous and violated the tariff regulations. He found, with respect to the proposed truckload rates, that no evidence had been offered regarding them, that it was doubtful whether they would be compensatory and that they had not been justified by appellees (R. 55). In its final report the Commission reaffirmed these findings with the statement that "the finding in the prior report that the so-called quantity and truckload proportional rates would be unlawful was not questioned by the

parties" (R. 20). These rates do not appear to have been mentioned in the brief of appellees below, and the district court made no finding with respect to them. Nevertheless, the decree of the district court sets aside the order of the Commission without qualification.

It is obvious that this decree is too broad. Even if the finding of the lower court on the lawfulness of the l. t. l. rates should be affirmed by this Court, the decree should be modified to permit the Commission's order to stand with respect to the quantity and truckload rates.

CONCLUSION

It is respectfully submitted that the decree of the district court should be reversed and the cause remanded with directions to dismiss the bill of complaint.

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APPENDIX

The pertinent provisions of the Interstate Commerce Act are as follows:

PART I

SEC. 2.[1] That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SEC. 3. (1)[2] It shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic, in any respect whatsoever or to subject any particular person,

[1] 24 Stat. 379, as amended, 49 U. S. C. § 2.

[2] 24 Stat. 380, as amended, 49 U. S. C. § 3.

company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

* * * * * *

PART II[1]

SEC. 202. (a) It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part.

* * * * * *

SEC. 216. (d) It shall be unlawful for any common carrier by motor vehicle engaged in

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[1] 49 Stat. 543 (known as the Motor Carrier Act, 1935), 49 U. S. C., Supp. I, ch. 9.

interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, or description of traffic in any respect whatsoever, or to subject any particular person, port, gateway, locality, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * * * *

SEC. 217. (a) Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established. Such rates, fares, and charges shall be stated in terms of lawful money of the United States. The tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information, as the Commission by regulations shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations.

Any tariff so rejected by the Commission shall be void and its use shall be unlawful.

* * * * *

SEC. 217. (c) No change shall be made in any rate, fare, charge, or classification, or any rule, regulation, or practice affecting such rate, fare, charge, or classification, or the value of the service thereunder, specified in any effective tariff of a common carrier by motor vehicle, except after 30 days' notice of the proposed change filed and posted in accordance with paragraph (a) of this section. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. The Commission may, in its discretion and for good cause shown, allow such change upon notice less than that herein specified or modify the requirements of this section with respect to posting and filing of tariffs either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

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